PUBLIC PROSECUTOR

v.

PETER YEOH & ANOR.

High Court, Penang
Tuan Vincent Ng Kim Khoay JC
[Criminal Trial No. 47 (58)-2-86]
22 OCTOBER 1992

DANGEROUS DRUGS LAW: Charge of trafficking heroin - Plea of not guilty - Accused challenging the validity of the quantitative analysis of the drugs by the chemist - Drug exhibits unsealed from time of seizure to the time they were received by the chemist - Effect of.

CRIMINAL PROCEDURE: Submission of no case to answer - Whether sustainable - Section 180 Criminal Procedure Code.

Both the accused were jointly charged with the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). The seized drugs were handed to the chemist for analysis 2 1/2 days after their seizure.

On the same day that the accused were arrested, the same police officers were involved in another raid at a house from which drugs were also seized which drugs were in packets similar in size and shape to the packets seized from the accused.

At the trial, the chemist testified that he had tested samples of the drugs which he confirmed to be heroin as defined by the Act.

At the close of the prosecution's case, defence Counsel made a submission of no case to answer under s. 180 of the Criminal Procedure Code on the grounds that:

(i) The quantitative analysis by the chemist was not accurate in that the chemist failed to take representative samples of the drug for testing.

(ii) The prosecution had failed to establish the identity of the drugs exhibited as being the same as the subject matter of the charge in that they were unsealed from the time of seizure upto the time they were handed to the chemist and there was no evidence that they were at all material times kept under lock and key.

Held:

[1] The quantitative testing of the drugs was wholly unsatisfactory as the chemist did not ensure that whatever samples he examined was representative of the gross contents of the packets submitted to him for analysis,

[2] However once the method and results of the chemists qualitative analysis of the random samples is conceded by the defence to be heroin, it is inherently incredible for a reasonable person to believe that from the rest of the unanalysed amount of the huge quantity of the drugs seized, not more than 15 grams of heroin could be or was found therefrom.

[3] The non-sealing of the drug exhibits during the vital period of its custody is not by itself fatal to the prosecution case but the circumstances as to how the exhibit was kept must be considered in order to arrive at a just finding.

[4] In a capital charge carrying the mandatory death penalty, unless the exhibit is under lock and key, the court would scarcely be inclined to believe that the exhibits were kept in a safe or inaccessible place especially so where the drug exhibit is not sealed and where the police officers in another raid had seized drugs in packets similar in size and shape to the packets seized from the Accused.

[5] In all the circumstances of the case, the prosecution has failed to prove an essential ingredient of the charge, that is the identity of the drug exhibit being the subject matter of the charge, which if unrebutted would warrant a conviction.

[First and Second Accused acquitted and discharged without calling on them to enter their defence on the charge.]

Cases referred to:
PP v. Lee Beng Siang [1991] 3 CLJ 2927 (refd)
PP v. Chew Yoo Choi [1990] 2 MLJ 447 (refd)
PP v. Ang Soon Huat [1991] 1 MLJ 1 (refd)
PP v. Lam San [1991] 3 MLJ 426 (foll)
Yeong Kia Heng v. PP [1992] 1 MLJ 327 (refd)

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drugs Act, ss. 37(j), 39A(2), 39B

For the 1st Accused - Karpal Singh (Harpal Singh with him); M\s. Karpal Singh & Co., Penang
For the 2nd Accused - Radzi Tan Sri Sheik Ahmad (Datin Mahani Abdul Hamid with him); M/s. Radzi Sheik Ahmad, Nor Farid, Kuala Lumpur
For the Public Prosecutor - Ishak bin Mohd. Yusoff

JUDGMENT

Vincent Ng Kim Khoay JC:
Both the accused persons were jointly charged as follows:

> Bahawa kamu bersama-sama pada 24 Mac 1985 jam lebih kurang 3.30 petang di Lintang Abdullah Ariff, Off Jalan Padang Tembak, Air Itam, dalam Daerah Georgetown, dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya, iaitu, heroin seberat 5414.2 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 39B (l)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39B (2) Akta yang sama.

At 3.20 p.m. on 24 March 1985 while PPP Sulaiman bin Menga Din (SP2) together with several other police officers in two cars were carrying out observation near Masjid Negeri, Pulau Pinang they saw a white motor car bearing reg. No. PAY 8168 (said car) with tinted window glass, carrying a driver and a passenger who appeared to be a female, in the front seat travelling from the direction of the Masjid Negeri towards Jalan Air Itam. They followed the car, but 300 meters thereafter they saw the said car turning right to Jalan Padang Tembak. As there were then also 3 or 4 cars ahead of them which were in the process of turning right, they were unable to do so in time and lost sight of the said car. They then proceeded to search for the said car and after 10 to 12 minutes they found the said car which had already stopped and parked under a tree at Lintang Abdullah Ariff in front of a house (the said house) bearing address No. 9 of the said road but across the road. When the police officers regained sight of the said car, it had already stopped - for how many minutes they did not know - but when they approached the said car to search same, all its doors were shut.

However, as soon as SP2 stopped his car in order to effect a search of the said car, he saw a male Chinese standing near the fence gate of the said house trying to run into the said house and through same though D/Kpl Zakarial bin Musa (SP5) said that this male Chinese ran from outside the fence of the said house towards it. This male Chinese was caught by Insp. Maarof and arrested at the back of the said house. Nothing incriminating was found in the said house. This male Chinese was identified as Ch'ng Kim Seong but until the close of the prosecution case, his whereabouts could not be traced by the police.

When SP2 opened the door of the said car, he saw therein the first accused namely Peter Yeoh in the driver's seat and the second accused namely Madam Goh Seok Hing in the front passenger's seat carrying a baby. He also saw an open brown paper bag (P4) placed on the floor space of the front passenger's compartment of the said car that is, on the floorboard beside the second accused. The registered owner of the said car was the first accused, who was then on the driver's seat with the ignition key still in the ignition keyhole. Within the said brown paper bag were two double layered opaque plastic bags (P5A and B and P6A and B) of which, SP2 said that only when he untied both the double layered plastic bags, did he discover and see 8 tightly packed rectangular shaped brown paper packets [P 5(D) to (G) and P5 (I) to (L)] enclosed in one double layered plastic bag (P5A and B) and six other similar packets [P6 (D) to P6 (I)] enclosed in the other double layered plastic bag (P6A and B), being a total of 14 brown paper rectangular shaped packets (the said 14 packets) which he suspected to contain heroin. SP2 also searched the boot of the said car and found Malaysian currency in note form amounting to RM19,030 in a cardboard box bearing the words "Yeo's". Neither the cardboard box, nor the currency was produced in court as, according to SP10 they were returned to the father of the first accused after due investigations.

The first accused and the second accused were then arrested and at all material times they behaved normally and did not try to run away. Insp. Maarof also arrested a Chinese couple who visited the said house and two Chinese women who were occupants of the said house, all of whom were subsequently released. One of the two female occupants was said to be the wife of Ch'ng Kim Seong and also known to the 2nd accused.

At about 4.20 p.m. on the same day, SP2 together with a few other officers involved in the search of the said car left the said house to conduct another raid at a house in Island Glades and returned to the said house at 6.30 p.m. SP2 and SP5 both admitted under cross-examination that in the subsequent raid at Island Glades they recovered 13 packets of heroin (the said 13 packets) from a room in the house, all of them packed in the same manner

and of similar size to exhibits P5(D) to P5(G), P5(I) to P5(L) and P 6(D) to P6(I) that were recovered from the said car. SP2 then made two police reports being Kpg. Baru Report No. 423/85 in respect of his arrest of the first and the second accused and Kampung Baru Report No. 424/85 in respect of the arrest of Ch'ng Kim Seong. Both, SP2 and SP5 also admitted under cross-examination that the 13 packets were recovered from a room in the house in Island Glades owned by the mother of Ch'ng Kim Seong, which, from the personal belongings, clothes, documents found therein and the statements taken from the said mother, was a room often used by Ch'ng Kim Seong. The latter's notoriety in connection with drugs and his running away from the scene of the offence in the current case may give rise to various speculations as to how he was connected to the said 14 packets recovered from the said car. However, it is neither permissible nor relevant at this stage for the court to speculate.

Ch'ng Kim Seong was indeed arrested on 24 March 1985 and was charged under s. 39B of the Dangerous Drugs Act under Kg. Baru Report No. 424/85. On 23 February 1986 he was detained in Muar Detention Centre, wherefrom he escaped on 5 January 1987 and was rearrested on 7 January 1989. On 18 February 1990 he was released from Johor Bahru prison and until now he is untraceable by the prosecution, though, besides the 21 witnesses offered to the defence at the close of the prosecution case, the learned Public Prosecutor had also, perhaps facetiously, offered to offer him to the defence in the event that he is hereafter traced.

At the close of the case for the prosecution, Counsel for both the accused persons submitted by virtue of s. 180 of the Criminal Procedure Code that "no case against the accused persons had been made out which if unrebutted would warrant their conviction" and that both should be acquitted and discharged without calling them to make their defence.

The defence Counsels' submissions were based on two grounds only, namely

(a) Firstly, a basic and fundamental ingredient of the charge, that is, the substance in the charge has not been proved to be heroin. As the learned D.P.P. had conceded that the Government Chemist, Ng Hock Sing (SP1) did not arrive at his quantitative results on the drug exhibits by virtue of the presumption in s. 37(j) of the Dangerous Drugs Act, and as all the prosecution witnesses have testified that the 14 tightly packed rectangular packets [P5(D) to P5(G), P5(I) to P5(L) and P6(D) to P6(I)] appeared, at the trial, to be in the same state as when they were recovered, then:

(i) when SP1 said "I took them (the packets) out (from the strongroom) only to take random representative samples", whether such samples taken for testing were representative of every one of the 14 packets;

(ii) there was also no indication of the amount taken for the purpose of analysis, which ought to be stated;

(iii) nor was there evidence that the contents of all the 14 packets were put together, pulverised to powder, coned and quartered and then samples taken for analysis.

In short, the quantitative rather than the qualitative test employed by SP1 was hotly challenged by the Defence.

(b) Secondly, the drugs were seized by SP2 at 3.30 p.m. on 24 March 1985 but only handed to PPP Fariduddin Datok Ahmad (SP10) the investigating officer of the case, at 3.30 a.m. on 25 March 1985, who then kept same in what he said, was a safe place but without having sealed them with a PDRM seal until 2.15 p.m. on 27 March 1985 when he personally handed same to SP1 for his analysis.

In short, the identity of the drug exhibits were challenged as they were unsealed from the time of seizure and even when it was handed to SP1, though it bore the Jabatan Kimia Pulau Pinang seal when they were returned to SP10 on 10 May 1985 at 10.20 a.m.

In regard to the first ground, (a) above, I agree with Counsel that the quantitative testing of the drugs in the said 14 packets by SP1 is wholly unsatisfactory. Probably due to his inexperience as he said that he had only 6 years working experience as a chemist when he tested the drugs in 1985 - he neither adopted the procedures set out in or relied on s. 37(j) of the Dangerous Drugs Act to arrive at his findings nor did he ensure that truly represen-

tative samples were taken from the total mass of drugs in the said 14 packets seized, by mixing the total mass, reducing them into powder, coning and quartering for homogeneity before taking the samples. There was no evidence that he repacked each or any one of the said 14 packets save that he repacked the whole of the package marked "E" that is, P4 (the brown paper bag which contain the said 14 packets) before returning them to SP10.

From the testimony of SP1 it is obvious that he left the said 14 packets continuously at all times, in the strongroom and took them out only to take out random representative samples but not for the purpose of making them homogeneous for taking such samples. Significantly, he did not say whether the random representative samples were taken from one packet, or two packets or all the packets or from several locations in one packet. In short, he did not ensure that whatever samples he examined was representative of the gross contents of the said 14 packets submitted to him for analysis. There was not even a visual examination or comparison of the said 14 packets by SP1.

He merely stated as follows:

> I examined the package E and found inside it a torn paper bag in which were 2 double layered plastic bags marked "A" and "B" respectively. I then examined and analysed the contents of plastic bags "A" and "B" and found in "A"
>
> (1) a plastic package marked "A1" in which were 4 paper packets containing a total of 1,799.6 grams of a white substance containing net weight of 1.535.9 grams of heroin.
> (2) A plastic package marked "A2" in which were 4 paper packets containing a total of 1,798.7 grams of a white substance containing net weight of 1,625.2 grams of heroin.
>
> I found in "B"
>
> (1) a plastic package marked "B1" in which were 4 paper packets containing a total of 1,796.0 grams of a white substance containing net weight of 1,499.9 grams of heroin.
> (2) A paper packet marked "B2" containing 449.8 grams of a white substance containing net weight of 387.3 grams of heroin.
> (3) A paper packet marked "B3" containing 448.3 grams of a white substance containing net weight of 365.9 grams of heroin.
>
> Heroin is a dangerous drug as "defined" in the Dangerous Drugs Act.

However, it is notable that the defence Counsel had not challenged SP1's qualitative findings in respect of the random representative samples that he had taken. If the current case had been a borderline case where the amount of heroin in the charge is not substantially above the 15 grams, see *PP v. Lee Beng Siang* [1979] 3 CLJ 2927 (23.02 grams heroin) and *PP v. Chew Yoo Choi* [1990] 2 MLJ 447 (16.59 grams heroin) and *PP v. Ang Soon Huat* [1991] 1 MLJ 1 (18.77 grams of diamorphine) the wholly unsatisfactory method of quantitative analysis of the contents of the said 14 packets employed by SP1 here would be sufficient by itself, for this court (if in the absence of the other ground) to call for the defence only on an amended charge of possession under s. 39A (2) of the Dangerous Drugs Act.

Following the principle laid down in the Supreme Court decision in *PP v. Lam San* [1991] 3 MLJ 426 which I consider is a binding authority on the quantitative aspect of the chemist's analysis of heroin, I hold that once the method and results of the chemist's qualitative analysis of the random samples is conceded by the defence to be heroin, it is inherently incredible for a reasonable person to believe that, from the rest of the unanalysed amount of the huge quantity of the drugs seized, being 6,292.4 grams (gross), not more than 15 grams of heroin could be or was found therefrom. As such, I reject the defence counsels' first ground as in (a) above.

I would now consider the second ground (b) of Counsels' submission.

From the evidence of SP10 it is established that the said 14 packets seized from the said car being P5 (D) to P5 (G), P5 (I) to P5 (L) and P6 (D) to P6 (I) were not sealed with the PDRM seal during the time they were in his custody from 3.30 a.m. on 25 March 1985 until 2.15 p.m. on 27 March 1985 when same were handed to SP1 for analysis. This is also quite apart from the unsatisfactory period of time that SP2 took to hand over to SP10 the said 14 packets. The drugs were seized at 3.30 p.m. on 24 March 1989 but only handed over to SP10 at 3.30 a.m. on 25 March 1989, within which period, SP2 was also involved in another raid in the Island Glades house (probably as chief raiding officer in view of the Police report on that raid being lodged by him), from which thirteen packets of drugs, similar in size and

shape with the said 14 packets (subject matter of this charge), were recovered from a room occupied by Ch'ng Kim Seong. SP10 had also admitted in cross examination that under I.G.S.O. rules he is required without any exception, to seal the drug exhibit as soon as possible after he received same. His only explanation for this was that he kept the exhibit in a safe place, no one had access to this exhibit (he did not say cabinet) and he personally handed the same to SP1 about 2 1/2 days after he had received the same.

Whilst the non-sealing of the drug exhibits during the vital period of its custody may not by itself be fatal to the prosecution's case, the court must nevertheless consider the other circumstances as to how such exhibit was kept, in order to arrive at a just finding. SP1 said that when he received the package from SP10 it "was not sealed and there was no PDRM seal. The package "E" was tied with a string and either glued or taped". Though SP10 had said in re-examination that during this vital 2 1/2 days before he handed the exhibit to SP1, nobody had access to the drug exhibits, yet in all his evidence he did not say that this exhibit was kept in the strongroom or was kept locked in his cabinet. He may truly have believed the place to be a safe or inaccessible place, but in a capital charge carrying the mandatory death penalty, unless the exhibit is also under lock and key the court would scarcely be inclined to believe, in forensic terms, what the witness may have believed. This is in sharp contrast with his (SP10) other evidence, when he said that from the time that he received the drug exhibit from SP1 until the time he handed the same to TPP Ismail bin Hussin (SP6) (to quote) "barang kes ini saya simpan di dalam steel kabinet pejabat saya dan sentiasa berkunci".

SP10 had a second bite at the proverbial apple when he was recalled by the DPP, but yet again he did not say that the exhibits were kept locked in his cabinet or strongroom. He merely said:

> Tidak ada pengecualian meteri exhibit-exhibit yang di hantar kepada Ahli Kimia. Ini bermakna semua barang-barang kes yang dihantar kepada Ahli Kimia diwajib dimeterikan.
>
> Tujuan I.G.S.O. untuk membantu pentadbiran dalaman. Kalau saya sendiri yang menghantar, barang kes tak perlu seal. Dari mula saya terima barang kes dari SP2 hingga dihantar ke Ahli Kimia ianya disimpan di tempat yang selamat dan inilah barang-barang yang ditunjuk.

As such, the only conclusion that this court could reasonably draw is that the said 14 packets were not placed in the strongroom or locked by SP10 during the said 2 1/2 days. This fact, when considered in conjunction with the fact that the drug exhibit was not sealed and that SP2 had also recovered the said 13 packets from another raid on the same evening in Island Glades (an entirely distinct case under his said second Kg. Baru police report No. 424/85) has raised serious doubt in my mind, and I am far from satisfied that the essential ingredient of the charge, that is the identity of the said drug exhibit, being the subject matter of same, has been made out by the prosecution at the end of their case which if unrebutted, would warrant a conviction.

It is useful to note that the second ground raised by the defence Counsel is not a rebuttable element of the ingredients of the charge as envisaged under s. 180 of the Criminal Procedure Code. As such, I would be indulging in a spurious exercise in semantics by calling for the defence due to the lesser burden placed on the prosecution at this stage, in order to apply the heavier "beyond reasonable doubt test" burden and acquit both the accused persons should they decide to remain silent - nay, a curious and circuitous manner of calling a spade a spade. Under s. 180 of the Criminal Procedure Code, it is only essential at this stage to ask myself a mere hypothetical question: "If I were to accept the prosecution's evidence as accurate, would it establish the case against the accused persons beyond a reasonable doubt". The short answer to this, for the various reasons adumbrated above, is in the negative in so far as the identity of the drug exhibits are concerned and none of the presumptions under the Dangerous Drugs Act have been raised which calls for rebuttal by the defence. See *Yeong Kia Heng v. Pendakwa Raya* [1992] 1 MLJ 327.

For the reasons above, I now acquit and discharge both the first Accused and the second Accused under s. 180 of the Criminal Procedure Code without calling them to enter on their defence on the charge.